



**Moiz Motors Limited v Musyoka (Civil Appeal E047 of 2023)
[2023] KEHC 3389 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E047 OF 2023**

FR OLEL, J

APRIL 25, 2023

BETWEEN

MOIZ MOTORS LIMITED APPELLANT

AND

KELVIN MUOKA MUSYOKA RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 17th March 2023 brought pursuant to provisions of Section 1A, 3A & 79G of the *Civil Procedure Act*, Order 42 Rule 6(2), 50 rule 6, order 51 rule 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. The main prayer's sought by the applicants are for extension of time to lodge an appeal and file a memorandum of Appeal against the judgment/ decree delivered on 16th February 2023 in Machakos CMCC No E86 Kelvin Muoka Musyoka Vrs Moiz Motors Limited & Ano. Further they also sought for stay of execution of the said Decree pending the hearing and determination of this appeal and that costs be provided for. The application is supported by a supporting affidavit of Shadrack Muinde dated 17th March 2023.
2. This application is opposed by the Respondent who filed his Replying Affidavit's dated 5th April 2023 sworn by the respondent.
3. The Appellants averred that they are aggrieved by the judgment and decree dated 16th February 2023 delivered in Machakos CMCC No E86 of 2020, specifically on quantum and future medical expenses and seek to appeal out of time. The delay in filing the appeal was occasioned by the need to consult the client to ascertain all options available and by the time a decision was made to appeal, the time allowed in law to file the appeal had lapsed. They further submitted that they have an arguable appeal which is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.



4. Further they state that if stay is not granted, the respondent is likely to attach their property and thus will suffer substantial loss and render this appeal nugatory.
5. Finally, the Applicants state that they are ready and willing to give security for the decretal sum in so ordered. They offered a bank guarantee of Family Bank given to Directline Assurance Company Limited.
6. The Respondent did oppose this application through his Replying Affidavit dated 5th April 2023. He stated that the reasons advanced by the appellant for delaying in filing the appeal were very flimsy and the said application has been made after unreasonably delay and was an afterthought. The appellants' also had not shown how they will suffer substantial loss if stay of execution is not granted as no execution process had been commenced by the respondents advocate.
7. Finally on the issue of security the respondent stated that the appellant cannot purport to deposit a bank guarantee as security as banks in this country are prone to collapse all the time and thus the same should be rejected as it was not in the proper form of security prescribed. That since the appeal was only on quantum, the appellants should pay half the decretal sum of Ksh150,000/= and deposit the other half in a joint interest earning account in the name of both advocates.

Analysis & Determination

8. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and parties' respective submissions and discern that two issues arise for determination.
 - a. Whether this court should extend time and allow the appellant to appeal out of time and
 - b. The second issue is whether the Appellant's has met the conditions necessary for the grant of stay pending appeal.
9. This application was filed in court on 27th March 2023, while the judgment against which the appellant seeks to appeal against was entered on 16th February 2023. By virtue of provisions of section 79G of the *Civil Procedure Act*, the appellants were to file their appeal within 30 days. They were thus two weeks late in filing their appeal. The appellant deponed that they had to communicate with their client and by the time the decision to appeal was reached time had already lapsed, hence this application. The respondent on their part alleged that this application was made after unreasonable delay and the applicants had failed to satisfy the basic requirements of the orders sought and thus this application should be dismissed.
10. Applications for extension of time are governed under provisions of Order 50 rule 6 of the *Civil Procedure Rules*.
Order 50 Rule 6 of the *civil procedure* provides that;

“where a limited time has been fixed for doing any act or taking of any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge time upon such terms(if Any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of time appointed or allowed.”
11. Extension of time is not a right of a party. It is an equitable remedy that is only available to deserving parties at the discretion of the court, which discretion has to be exercised judiciously and not on whim, sympathy and/or caprice. The court also has to consider the period of delay, reasons for the delay, chances of appeal succeeding and finally the decree of prejudice to the respondent. See *Salat*



v independent Electoral & boundaries commission & 7 others (2014) KLR-SCK, & *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* (2013) eKLR

12. Giving consideration to the above guiding factors, I do find that this application has been filed within a reasonable period of two weeks after the time allowed to file the appeal had lapse, the reasons advanced though weak are plausible and the court is inclined to give the appellant the benefit of doubt, the proposed appeal raises triable issues and finally the prejudiced suffered by the respondent can be compensated by way of costs. The prayer for leave to lodge an appeal out of time against the judgment and decree of the Honourable Ann Nyoike principal Magistrate judgment dated 16th February 2023 in Machakos CMCC No E86 of 2020 is allowed.
13. The appellants also applied for stay of execution pending appeal, this is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant
(see *Butt v Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & another v Agnes Nalika Chereto* (2012) eKLR)
14. The decree appealed against was delivered on 16th February 2023. The application herein was filed on 27th March 2023. This was within a period of 45 days from the date of judgment and thus it can be said that this application have been file timeously.
15. On the likelihood of suffering substantial loss, it is evident that the decretal sum together with costs is a tidy sum of money. The Appellant raises reasonable grounds that the Respondent's will not be able to refund the said sum without hardship if paid out to them. I note that the Respondents have not filed an affidavit of means as a basis of assessing if he can repay the decretal sum (if paid out).
16. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* (2010) eKLR the court states as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
17. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
18. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is persons of means, I find that the Appellants have satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.



19. On the security, the Appellants have indicated that they are ready and willing to give a bank guarantee. The Respondent on the other hand states that he should be paid half the decretal sum and the other half be deposited in a joint interest earning account in the names of both counsels on record for the parties.
20. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
21. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
22. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitahi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal nor will any party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

Disposition

23. Taking all relevant factors into consideration. It would be just and proper to allow the appellant ventilated all issues raised in their appeal and have it determined on merit. I do therefor grant the following orders;
 - a. The Appellants are hereby granted leave to file their memorandum of appeal challenging the judgment and decree dated 16th February 2023 issued in Machakos CMCC NO E86 of 2020, within the next 7 days from the date of this Ruling.



- b. That stay of execution of the decree herein is granted on condition that the appellants do pay half the decretal sum of Ksh 150,000/= to the respondent and further the appellants do give a bank guarantee (specific to this suit) for the other half of the decretal sum being Ksh 150,000/ = .
- c. This condition is to be met within 30 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
- d. The costs of this Application are awarded to the Respondent.

24. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25TH DAY OF APRIL, 2023.

In the presence of;

.....for the Applicant

.....for Respondent

.....Court Assistant

